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**In the Supreme Court**

OF THE  
**United States**

—  
OCTOBER TERM, 1945

—  
**No. 1200**  
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WALTER S. HELLER,

*Petitioner,*

VS.

COMMISSIONER OF INTERNAL REVENUE,

*Respondent.*

**PETITION FOR WRIT OF CERTIORARI**  
**to the United States Circuit Court of Appeals**  
**for the Ninth Circuit.**

—  
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*To the Honorable Harlan Fiske Stone, Chief Justice  
of the United States, and to the Honorable  
Associate Justices of the Supreme Court of the  
United States:*

Petitioner, Walter S. Heller, prays that a writ of certiorari be issued to review that portion of the judgment of the United States Circuit Court of Appeals for the Ninth Circuit entered January 27, 1945, adverse to petitioner.

**OPINIONS BELOW.**

The opinion of the Circuit Court of Appeals for the Ninth Circuit (R. 165) is not reported.

The opinion of the Tax Court of the United States (R. 33-58) is reported in 2 T. C. 371.

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**JURISDICTION.**

The judgment of the Circuit Court of Appeals was entered on January 27, 1945 (R. 171). The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. Code, Sec. 347).

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**QUESTION PRESENTED.**

Where the facts relating to a reorganization are not in dispute and the Tax Court has found that no gain or loss may be recognized under Section 112(b) (3) of the Revenue Act of 1936, is the finding of the Tax Court a finding of fact not subject to review by the Circuit Court of Appeals under the rule of *Dobson v. Commissioner of Internal Revenue*, 320 U. S. 489, or is such finding a conclusion of law subject to review by the Circuit Court of Appeals?

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**STATEMENT.**

There was no dispute as to the facts in the Tax Court; they show that:



During the years 1923 to 1927 petitioner and Harry A. Bruce were members of a partnership engaged in the investment banking business in San Francisco, California, under the name of Heller, Bruce & Co. Edith C. French was an employee of the partnership.

On January 1, 1927, Heller, Bruce & Co. was incorporated under the laws of the State of Delaware (this corporation will be hereinafter referred to as the Delaware corporation) (R. 129). The Delaware corporation issued its stock in exchange for the assets of the partnership. Under the applicable Revenue Act, no gain or loss was recognized on the exchange (R. 130). From January 1, 1927, until the issuance of a certificate of dissolution by the Secretary of State of Delaware on December 20, 1937, the Delaware corporation engaged in the investment banking business in San Francisco. Harry A. Bruce, Edith C. French, and the petitioner were at all times the stockholders, officers, and directors of the Delaware corporation (R. 130, 131).

In 1937 petitioner decided to change the state of incorporation of Heller, Bruce & Co., from the State of Delaware to the State of California for certain business purposes (R. 109-110). In order to accomplish this change, the following steps were taken:

On December 6, 1937, Heller, Bruce and Co. was organized under the laws of the State of California (this corporation will be hereafter referred to as the California corporation) (R. 132). On December 15, 1937, the California corporation issued and sold to

petitioner 1500 shares of its common stock and 2000 shares of its preferred stock for cash (R. 133).

On December 15, 1937, the directors of the California corporation adopted a resolution authorizing the purchase of the assets of the Delaware corporation at book value, less liabilities, for cash. On the same date, a meeting of the Board of Directors of the Delaware corporation was held accepting the offer of the California corporation to purchase the assets of the Delaware corporation. On the same date, all of the stockholders of the Delaware corporation signed a consent to its dissolution.

On December 20, 1937, the Delaware corporation was dissolved and the purchase price of the assets received by the Delaware corporation from the California corporation was distributed to the stockholders of the Delaware corporation in proportion to the stock held by them (R. 135, 136).

On January 20, 1938, 45 shares of the common stock and 60 shares of the preferred stock held by petitioner were transferred by petitioner to Harry A. Bruce and one share of the preferred stock was transferred to Edith C. French (R. 133).

The Tax Court held that petitioner did not sustain a deductible loss in 1937 by reason of the series of steps above set forth, that they were part of one transaction, the substance of which was an exchange of stock in the Delaware Corporation for stock in the California corporation pursuant to a plan of reorganization, and that no gain or loss is recognizable be-

cause of the provisions of Section 112(b) (3) of the Revenue Act of 1936 (R. 57).

The Circuit Court of Appeals for the Ninth Circuit did not determine the question of law presented as to whether, on the stipulated facts, the plan of reorganization was a tax-free reorganization but held that, in line with the principle of the case of *Dobson v. Commissioner*, 320 U. S. 489, there was "warrant in the record" to support the finding of the Tax Court and, therefore, affirmed the judgment of the Tax Court on this point.

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#### **SPECIFICATIONS OF ERROR.**

The Circuit Court of Appeals erred

1. In holding, on the authority of *Dobson v. Commissioner of Internal Revenue*, 320 U. S. 489, that the decision of the Tax Court on the question as to whether or not the reorganization was a tax-free reorganization within the provisions of Section 112(b) (3) of the Revenue Act of 1936 was a question of fact not subject to review by the Circuit Court of Appeals;

2. In affirming the judgment of the Tax Court on this point.

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#### **REASONS RELIED UPON FOR ALLOWANCE OF WRIT.**

The decision in this case is in direct conflict with the decision of the Circuit Court of Appeals for the Third Circuit in the case of *Thornley v. Commis-*

sioner, decided January 15, 1945, page 10,724, CCH, paragraph 9139, on an important question relating to the interpretation of Federal income tax statutes. In the case of *Thoruley v. Commissioner*, petitioner held a ten per cent interest as a member of a copartnership. On May 1, 1929, the business and assets of the partnership were transferred to a corporation pursuant to an agreement between the partners and the newly formed corporation, and the corporate shares were issued to the partners in proportion to their respective partnership interests. On January 4, 1937, petitioner sold his stock in the corporation. It was agreed that under the provisions of the Revenue Act of 1928 no gain or loss was recognized from the exchange on May 1, 1929, and that the corporate stock received from the exchange had the same base as the partnership interests. The question presented was whether the taxpayer's stock was received in exchange for his partnership interest or for the assets of the partnership and whether taxpayer was entitled under Section 117(c) (1) of the Revenue Act of 1936 to tack onto the period during which he held the stock the additional period during which he held the partnership interest exchanged for stock. The Tax Court held that the taxpayer was entitled to tack onto the holding period of the stock only the period during which he held an interest in the specific assets of the partnership. The Circuit Court of Appeals for the Third Circuit held that the ultimate finding of the Tax Court was a conclusion of law, or at least a determination of a mixed question of law and fact, that it was to be distinguished from the findings of pri-

mary, evidentiary, or circumstantial facts and was subject to judicial review, that the rule in the *Dobson* case did not apply, and that the ultimate finding of the Tax Court was subject to review by the Circuit Court of Appeals.

It is respectfully submitted that the conclusion of the Circuit Court of Appeals for the Ninth Circuit in this case to the effect that the finding of the Tax Court that there was a tax-free reorganization was a finding of fact not reviewable under the *Dobson* case is in conflict with the decision of the Circuit Court of Appeals for the Third Circuit in *Thornley v. Commissioner*, supra, which held that a similar finding made by the Tax Court was a conclusion of law subject to review by the Circuit Court.

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#### CONCLUSION.

It is respectfully submitted that this petition for a writ of certiorari should be granted.

Dated, San Francisco, California,

April 16, 1945.

SIDNEY M. EHRLMAN,

*Counsel for Petitioner.*

SAMUEL S. STEVENS,

*Of Counsel.*